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NO. 82-

IN THE

SUPREME COURT OF THE UNITED STATES

October, Term 1983

PAULINE T. SAWYER,
Petitioner

v.

duPONT GLORE FORGAN, INC.
et al
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. The decision of the Court of Appeals for the Eleventh Circuit refusing to construe the Federal Rules of Civil Procedure with the liberality necessary to achieve the ends of justice is in contravention.

2. The decision of the Court of Appeals to affirm the District Court's denial for leave to amend is antithetical to the liberal pleading policy of the Federal Rules of Civil Procedure, "Leave to amend shall be freely given when justice so requires."

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The Petitioner Pauline T. Sawyer, formerly Pauline T. Roberts, respectfully requests that a Writ of Certiorari be issued to review the judgment of the United States District Court, for the Middle District of Florida which

dismissed the amended complaint of Petitioner, Mrs. Sawyer, with prejudice.

OPINION BELOW

No opinion was rendered by the District Court for the Middle District of Florida or by the United States Court of Appeals for the Eleventh Circuit.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on November 7, 1983. This petition for certiorari was filed within ninety (90) days of that date. This court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Federal Rules of Civil Procedure 12(b)(c)(e)(f) 8(a) and 15(a).

STATEMENT OF THE CASE

This case involved a third party beneficiary contract claim. The original complaint was filed November 15, 1974. The Fourth Amended Complaint, which is the subject of this petition, was dismissed with prejudice by the United States District Court, Middle District of Florida. The jurisdiction of the District Court was invoked under diversity of citizenship 28 U.S.C. §1332.[1] The petitioner appealed to the United States Court of Appeals for the Eleventh Circuit. Jurisdiction was invoked pursuant to 28 U.S.C. §1291 (1976) as an appeal from final judgment of the District Court. The Court of Appeals Per Curiam Affirmed the District Court's decision to dismiss with prejudice.

The complaint was amended on four different occasions in an effort to establish a cause of action. The first two complaints were dismissed without prejudice. The third amended complaint alleged that Plaintiff, Mrs. Sawyer, and a Mr. Howard Worth had entered into an oral agreement such that Plaintiff would sell her 150 shares of Honeywell stock for the sum of $22,117.19, endorse these

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1The individual Defendants, Harold A. Rousselot, John W. Allyn, John J. Trask, Mark J. Appleman, James M. King, Austin J. Lyons, Harry A. Pujals, Edwin B. Peterson, Gough W. Thompson, Jr., Thomas W. Thompson, Stanton W. Frederick, Peter R. duPont, Willis B. Hamilton, Robert J. Monahan, Alfred Rhett duPont, Arthur C. Person, James J. Hughes, William W. Madden, William N. Allyn, William A. Victor, Alfred J. Rauschman, Warren Ackerman, Jr., Donald Mutterperl, and Rudolf Smutny are former general partners of Francis duPont Company. All individual Defendants are residents of either the state or New York, Illinois, New Jersey, Connecticut, or Washington.

monies to Mr. Worth, who would exercise his stock option at a reduced price. The complaint alleged that through this agreement and after Mr. Worth exercised his option, he would then transfer 200 shares of stock back to Plaintiff in consideration for the monies which she had loaned him.

The complaint further stated that pursuant to this oral agreement, Plaintiff endorsed check number 626-04192 made payable to her from Francis duPont Company and gave it to Mr. Worth, which he endorsed and deposited in his account on January 26, 1970. A copy of this check, indicating the above information, was attached to the complaint as Exhibit Number 1.

The complaint alleged that on February 16, 1970, Mr. Worth sent a letter to Defendant Francis duPont Company and demanded the transfer of 200 shares of Honeywell stock to Plaintiff's account. This letter was attached as Exhibit 2. Plaintiff alleged that this demand by Mr. Worth was an obligation of defendant's contract of employment with Mr. Worth and that this contract was made for the direct and substantial benefit of Plaintiff. Plaintiff asserted that as a result of the Defendant's failure to reject the terms of their employment contract as to perform the requested transfer, a breach of contract occurred.

On September 11, 1981 the District Court entered an order dismissing the third amended complaint with leave to

amend and specifically suggested that any amended pleading address the following defects which, absent cure, would result in dismissal. The District Court first stated that Plaintiff needed to address the question of when she became aware of her alleged cause of action. Secondly, the court pointed out the applicable statute of limitations was four years under §15.11(3)(K), because the complaint did not allege a written acknowledgement by Defendants of their receipt of the transfer order, i.e. the letter written by Mr. Worth, so as to constitute a contract founded on a written instrument. The court further determined that fraud must be alleged with particularity.

The Fourth Amended complaint was inspired by the need to address the

deficiencies pointed out above. It contained all material allegations which were within the third Amended Complaint. It also addressed the question of when the Plaintiff became aware through the inclusion of paragraph 34 in Count II, "Plaintiff did not discover Defendant's concealment until October 23, 1972." The question of "what constituted the written contract" was specifically addressed in paragraph 17, Count I, "The Defendant's written acknowledgement, that they had received the order of Mr. Worth created a Third Party Beneficiary Contract with the Plaintiff as the beneficiary of said contract."

Finally, the demand for a particularized allegation of fraud was addressed in paragraphs 32 and 33,

Count II:

> "32. The Defendants in order to conceal from the Plaintiff the fact that she had received the benefit of 200 shares of Honeywell, Inc. stock, after the death of Howard W. Worth, concealed the existence of the letter dated February 16, 1970; and failed to carry out the instructions of said Howard W. Worth.
>
> 33. The Defendants wilfully , wantonly, and intentionally concealed the direction of Howard W. Worth to them for the transfer of 200 shares of Honeywell, Inc. common stock."

Thus, the Fourth Amended Complaint addressed all of the deficiencies alluded to in the District Court's order dismissing the Third Amended Complaint.

On November 12, 1981, duPont Glore filed a motion to dismiss the Fourth Amended Complaint for failure to state a claim upon which relief may be granted, specifically requesting that such dismissal be at prejudice. On November 23, 1981, Plaintiff filed a responsive pleading and along with it Mrs. Sawyer

filed a motion for leave to file a Fifth Amended Complaint and also filed a Fifth Amended Complaint. The Fifth Amended Complaint goes still further in addressing the pleading deficiencies dismissing the Third Amended Complaint without prejudice. It included documentary exhibits which were not included in the earlier pleadings. These documents prove the existence of the contract under which Mrs. Sawyer seeks to recover as a third party beneficiary.

On February 18, 1982, the District Court issued a final order which dismissed the Fourth Amended Complaint with prejudice. On November 7, 1983, the United States Court of Appeals for the Eleventh Circuit Per Curiam Affirmed the District Court's decision.

REASONS FOR GRANTING THE WRIT

I. The decision of the Court of Appeals for the Eleventh Circuit refusing to construe the Federal Rules of Civil Procedure with the liberality necessary to achieve the ends of justice is in contravention to established Public Policy as held by this court in Conley v. Gibson, 355 U.S. 41, 48 (1957), and Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

The granting of the Writ of Certiorari by the Supreme Court of the United States will clarify the misapplication of the most elemental principle of the Federal Rules of Civil Procedure:

> "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." Conley.

Conley further stated that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the Plaintiff

can prove no set of acts in support of his claim that would entitle him to relief. This "modern day legal maxim" has developed in conjunction with "liberal pleading policy" established by the Federal Rules of Civil Procedure. The rules were designed to facilitate the operation of the legal system; however "JUSTICE" remains the paramount objective of this system, and form is not meant to triumph over substance.

The complaint in the instant case clearly alleged facts sufficient to withstand a motion to dismiss on the barebones pleadings. Because of the ever increasing problem of court congestion and the desire to alleviate court overload, it has become alarmingly common for courts to dismiss complaints on the barebones pleadings. In dis-

missing these complaints at such an early stage courts are prematurely making decisions on the merits and on the credibility of evidence. The case at bar provides an excellent opportunity for this court to once again make a definitive statement regarding the sufficiency standard which courts should apply when called upon to review a motion to dismiss for failure to state a claim. By engaging in this "periodic exercise," this court will enhance the administration of justice by dissuading district court judges from hastily granting F.R.Civ.P. Rule 12(b)(6) motions, (Appendix A2) "... UNLESS IT APPEARS TO A CERTAINTY THAT THE PLAINTIFF WOULD NOT BE ENTITLED TO RECOVER UNDER ANY STATE OF FACTS WHICH COULD BE PROVIDED IN SUPPORT OF HIS

CLAIM." Cook and Nichol, Inc. v. Plimsol Club, 451 F.2d 506 (5th Cir. 1971). The issue is not whether a Plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.

We submit that the context of the rules in their most basic and essential principles, requires that pleadings be construed so "as to do substantial justice" [Rule 8(f)] and that "Rules do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all that rule 8(a)(2) requires is a short and plain statement of the claim that will give the Defendant fair notice of what the Plaintiff's claim is and the grounds upon which it rests." The opportunity for discovery and other pretrial proce-

dures such as Rules 12(c)(e)(f) (Appendixes A2 and A3), were established to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues.

In the instant case, the complaint in its amended form stated sufficient facts to establish the existence of a contract claim.

This court, in an opinion written by Chief Justice Burger, recently stated:

> When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. THE ISSUE IS NOT WHETHER A PLAINTIFF WILL ULTIMATELY PREVAIL BUT WHETHER THE CLAIMANT IS ENTITLED TO OFFER EVIDENCE TO SUPPORT THE CLAIMS. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely, but THAT IS NOT THE TEST. Moreover, it is well established that, in passing on a motion to dismiss, whether . . . or for failure to state a cause of action, THE ALLEGATIONS OF THE COMPLAINT SHOULD BE CONSTRUED FAVORABLY TO THE PLEADER.

(emphasis provided). Scheuer. Pleadings are not the proper form in which to test the credibility of evidence. Judge Goldberg cited Burnes v. Merrit, 376 F.2d 8, 11, n.6 (5th Cir. 1967), for the proposition that dismissal at such an early stage is not looked upon favorably. Judge Goldberg then referred to Chief Judge Burn's pronouncement in Barber v. Motor Vessel "Blue Cat," 372, F.2d 626, 627 (5th Cir. 1967):

> .....the Trial Court forgot the lesson so often brought home by us that at this day and time dismissal of a claim — land based, waterborne, amphibious, equitable, legal, maritime, or an ambiguous, amphibious mixture of all of them, Mike Hooks, Inc. v. Pena, 5 Cir., 1963, 313 F.2d 696, 1963 AMC 355, on the basis of barebone pleadings is a PRECARIOUS ONE WITH A HIGH MORTALITY RATE. Millet v. Godchaux Sugars, Inc., 5 Cir., 1957, 241 F.2d 264.

It is up to this court to make a definitive statement concerning this

issue of dismissal on the barebones pleading. In doing so, this court will not only prevent this particular case from becoming one of the many monuments to the short-lived motions to dismiss and their high mortality rate; but it will enhance the administration of justice in general.

II. The decision of the Court of Appeals to affirm the District Court's denial for leave to amend is antithetical to the Liberal Pleading Policy of the Federal Rules of Civil Procedure, "Leave to amend shall be freely given when justice so requires."

Amendment of pleadings is liberally allowed pursuant to F.R.Civ.P. 15(a), (Appendix A4), which re-emphasized the well established principle that pleadings are to assist the disposition of litigation on the merits. Moore's Federal Practice (2d Ed, 1948) §15.02. The United States Supreme Court speci-

fically addressed the application of F.R.Civ.P. 15(a) in the landmark case of Foman v. Davis, 371, U.S. 178 (1962):

> Rule 15(a) declares that leave to amend "shall be freely given when justice so requires; "THIS MANDATE IS TO BE HEEDED....If the underlying facts or circumstances relied on by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits...Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, BUT OUTRIGHT REFUSAL TO GRANT THE LEAVE WITHOUT ANY JUSTIFYING REASON APPEARING FOR THE DENIAL IS NOT AN EXERCISE OF DISCRETION; IT IS MERELY ABUSE OF THAT DISCRETION AND INCONSISTENT WITH THE SPIRIT OF THE FEDERAL RULES. (emphasis provided).

Justice Goldberg's opinion in Foman is so precise in discussing the policy behind liberal pleading that it is amazing that an issue regarding leave to amend a complaint can still arise. However, because the Court of Appeals affirmed the District Court's erroneous decision to deny leave to amend; it is

imperative that this court review yet another example of judicial subversion of the liberal pleading policy set forth in the Federal Rules of Civil Procedure.

Recently, in a case out of the Eleventh Circuit, Foman is cited with approval by Circuit Judge John M. Wisdom. Dussouy v. Gulf Coast Inv. Corp., 660 F.2d 594 (5th Cir. 1981). A brief excerpt of Judge Wisdom's opinion on "leave to amend" is relevant to this petition:

> In our review of the trial court's exercise of discretion, Rule 15(a), of course, provides the starting point. "Discretion" may be a misleading term, for Rule 15(a) severely restricts the judge's freedom, directing that leave to amend "shall be freely given when justice so requires." IT EVINCES A BIAS IN FAVOR OF GRANTING LEAVE TO AMEND. The policy of the federal rules is to permit liberal amendment to facilitate determination of claims on the merits and to prevent litigation from becoming a technical

> exercise in the fine points of pleading. (citations omitted). Thus, UNLESS THERE IS SUBSTANTIAL REASON TO DENY LEAVE TO AMEND, THE DISCRETION OF THE DISTRICT COURT IS NOT BROAD ENOUGH TO PERMIT DENIAL. (citation omitted). Dussouy, at 597 - 198.

The law is clear; however, as in this case, its application has become misguided.

Prejudice to the non-moving party is the touchstone for the denial of an amendment. Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971). Where no prejudice will result to the non-moving party, amendments to pleadings should be liberally allowed. This fundamental requirement of prejudice is also restated in a case in which duPont Glore was previously involved, duPont Glore Forgan, Inc., v. Arnold Bernhard and Co. Inc., 73 F.R.D. 313 (S.D.N.Y. 1976). There is no prejudice

produced by an amendment which only clarifies the previous allegations. There is no reason why such an amendment was denied and dismissal with prejudice was improper. The Fourth Amendment's language is clear enough to establish a sufficient claim. Therefore, there was absolutely no justification for the denial of leave to file the proposed Fifth Amended Complaint which merely went further in clarifying the deficiencies set forth in the District Court's order dismissing the Third Amended Complaint.

The Defendant has correctly pointed out that where the court finds undue delay, bad faith, dilatory motive or some other prejudicial influence; the court then has the discretion to deny leave to amend. There is no evidence

that any of these circumstances exist. The Defendant has continually attempted to cloak the Appellant with the appearance of delay; however, the delays which have plagued this litigation have been caused by the trial court. During the six years from September 11, 1981 to September 29, 1975 (the date of Defendant's response to the initial complaint), the District Court consumed five years and six months elapsed time. (See Schedule below).

Time Consumed by the Court

From	To	Motion or Pleading	Time
9/30/75	12/8/75	Defendant's Motion to Dismiss (R.18)	2mos/8 days
1/12/76	1/28/76	Defendant's Motion to Dismiss (R.31)	16 Days
3/1/76	4/5/76	Defendant's Request for Clarification. (R.53)	1mo/5 days

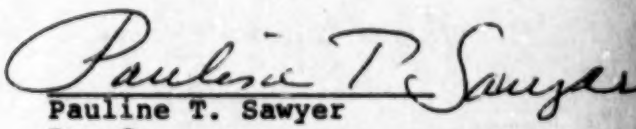
5/21/76	9/1/78	Memo in Opposition to Plaintiff's Motion to Produce (R.83) and	
11/14/77		Plaintiff's Motion to Amend Second Amended Complaint (R.134)	27mos/12 days
10/19/78	9/11/81	Plaintiff's Memo in Opposition to Defendant's Motion to Dismiss (R.230)	34 mos/23 days
		GRAND TOTAL:	5 Yrs/6 Mos

It was up to the Court of Appeals for the Eleventh Circuit to remedy the injustice which has occurred in this case. In affirming the District Court's dismissal without leave to amend, the Court of Appeals failed in its responsibility to facilitate justice between the parties. In disposing of a motion to amend pleadings, the court should be prompted by a desire to do justice between the parties rather than to penalize counsel - In Re Haskell, 73 F.2d 879.

CONCLUSION

For the reasons set forth in the Petition it is respectfully prayed that a Writ of Certiorari should issue to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true and correct copies of the foregoing have been furnished by U.S. Mail this 7th day of March, 1984 to Hugh J. Turner, Jr., Esq., Smathers & Thompson, 1301 Alfred I. Dupont Building, 169 E. Flagler, Miami, Florida 33131, (305) 379-6523.

Pauline T. Sawyer

Pauline T. Sawyer
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APPENDIX

A1

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 82-5328

D.C. Docket No. 74-00686

PAULINE T. SAWYER, formerly
PAULINE T. ROBERTS,

Plaintiff-Appellant,

versus

DUPONT GLORE FORGAN, INC.,
a Florida Corporation, Et Al.

Defendants-Appellees.

Appeal from the United States District Court
For the Middle District of Florida

(November 7, 1983)

Before VANCE and JOHNSON, Circuit Judges, and PITTMAN*, District Judge.

PER CURIAM:

AFFIRMED. See Circuit Rule 25.

"Costs taxed against plaintiff-appellant."

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* Honorable Virgil Pittman, U.S. District Judge for the Southern District of Alabama, sitting by designation.

VERSION OF MANDATE

FEDERAL RULES OF CIVIL PROCEDURE

Rule 12(b)

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:..... (6) failure to state a claim upon which relief can be granted....

12(c)

After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion

shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

12(e)

If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may

strike the pleading to which the motion was directed or make such order as it deems just.

12(f)

Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

Rule 8(a)

A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short

and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative of several different types may be demanded.

Rule 15

(a) Amendments: A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days

after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleadings, whichever period may be longer, unless the court otherwise orders.

END OF DOCKET